A

Solsis (M) Sdn Bhd v Kenny Woo B'ng Tat & Anor

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-555–12 OF 2018
DARRYL GOON J
26 NOVEMBER 2019

C *Evidence — Prima facie evidence — Submission of no case to answer — Plaintiff sued defendants in their capacity as guarantors for financial obligations of a company — Defendants submitted no case to answer — Defendant elected not to call any evidence should submission of no case to answer fail — Whether plaintiff established prima facie case against defendants* D *— Whether evidential burden shifted to defendants — Whether submission of no case to answer failed — Whether court ought to enter judgment in favour of plaintiff*

E The plaintiff sued the defendants in their capacity as guarantors for the financial obligations of a company by the name of Facilipack Industries Sdn Bhd ('Facilipack') amounting to RM6,303,137.78. The plaintiff's witness, PW1 testified that vide a procurement and supply agreement, the plaintiff procured the supply of resins to be sold to Facilipack with payments to be made by Facilipack to the plaintiff upon the credit terms agreed. This testimony was F also supported by the testimony of PW2, the chief operating officer of the plaintiff. PW3 who was an accounts executive with the plaintiff testified to the various documents tendered namely the purchase orders, quotations by third party supplier of resins known as Lanai, Lanai's delivery orders, tax invoices and payments made by the plaintiff to Lanai. PW3 also testified to the amounts due G under the various documents issued and the total amount said to be due and owing by Facilipack. PW4, the managing director of the plaintiff referred to text messages ('the text messages') exchanged between him and the second defendant. PW4 stated that these messages showed proof that the suppliers had been sending the goods to Facilipack since November 2016 until February H 2018, contrary to the defendants' contention. The defendants had submitted no case to answer and consequently, learned counsel for the defendants was put to the usual election not to call any evidence should the submission fail, and learned counsel so elected. The defendant submitted that no goods were in fact ever supplied by the plaintiff to Facilipack. The transactions portrayed were I said to be a sham created for the sole intention of facilitating the use by Facilipack of the banking facilities that the plaintiff enjoyed from its bank, the Malayan Banking Bhd ('Maybank'). The defendants further submitted that the actual dealings between the plaintiff (as the subsidiary of a public listed company known as Dataprep Holdings Bhd) and Facilipack were illegal money

lending transactions which was contrary to the Listing Requirements of Bursa Malaysia and thus illegal. In addition, based on the text messages, the defendants urged the court to conclude that the parties were somehow seeking to mislead Maybank and that, somehow, it also established that there were in fact no sale of resins and the transactions were not genuine.

Held, allowing the plaintiff's action:

(1) It was argued by learned counsel for the defendants that in many of the delivery orders, it was stated that the resins were sold to and delivered to the plaintiff. That may well be so, but at the same time, on some of the very same delivery orders there were also Facilipack's stamps acknowledging receipt of the resins delivered. The plaintiff's witnesses may not have delivered the resins themselves and therefore may not have personal knowledge of their delivery to Facilipack. Yet, the documents tendered in evidence pointed, prima facie, to resins having been purchased and delivered to Facilipack and they remained so, until and unless evidence to the contrary was led (see para 66).

(2) With regards to the text messages, PW4 explained that Maybank's query was due to an error in the van number and the trailers that were given. Although put to him by learned counsel for the defendants, PW4 denied that this was all because there was no actual physical delivery. PW4 had testified to the context of the text messages and had provided his explanation, having regard to the text messages themselves, which were neither implausible nor inherently unmaintainable. Thus, unless evidence was led to the contrary, the mere inferences the defendants urged the court to draw from these text messages could not prevail over the testimony of PW4 to the contrary (see paras 75–76).

(3) Whether it was an illegal scheme to lend money to Facilipack would depend primarily on it being established that there was indeed no sale and purchase of resins transacted and as depicted by the documents and testified to by the plaintiff's witnesses (see para 80).

(4) As regards the breach of Bursa's listing requirements, the procurement and supply agreement were between the plaintiff and Facilipack and the credit arrangement was between the plaintiff and Facilipack. The plaintiff itself, as opposed to Dataprep Holdings Bhd, was a private limited company and not a listed company. As such, the plaintiff did not come within the purview of Bursa. Further, there was nothing to suggest that Bursa's listing requirements had force of law either as written law or unwritten law. Bursa's listing requirements had binding force between Bursa and the companies that were within its purview but such listing requirements would not render any contract in breach of it an illegality or such as would attract the application of s 24 of the Contracts Act 1950 (see paras 81–82).

(5) The evidence led by the plaintiff quite clearly established a prima facie case against the defendants for the amounts claimed. While the legal burden of proof was always upon the plaintiff, from the evidence led by the plaintiff, the evidential burden had shifted to the defendants. Since there was no evidence led by the defendants, there was nothing to rebut the evidence tendered by the plaintiff. In this regard, it was not sufficient in this case for the defendants merely to pose questions and to challenge the legitimacy of the case presented by the plaintiff without the benefit of any evidential foundation. Considering the foregoing, the court held that the defendants' submission of no case to answer failed. Having elected to call no evidence, the court was perforce to enter judgment in the plaintiff's favour (see paras 89–90 & 92–94).

[Bahasa Malaysia summary

Plaintif memfailkan saman ke atas defendan-defendan sebagai penjamin bagi kewajipan kewangan syarikat yang bernama Facilipack Industries Sdn Bhd ('Facilipack') berjumlah RM6,303,137.78. Saksi plaintif, PW1 memberi keterangan bahawa melalui perjanjian perolehan dan pembekalan, plaintif memperoleh bekalan resin untuk dijual kepada Facilipack dengan pembayaran yang akan dibuat oleh Facilipack kepada pihak plaintif berdasarkan terma kredit yang dipersetujui. Testimoni ini juga disokong oleh keterangan PW2, ketua pegawai operasi plaintif. PW3 yang merupakan eksekutif akaun plaintif memberi keterangan mengenai pelbagai dokumen yang dikemukakan iaitu pesanan pembelian, sebut harga oleh pembekal resin pihak ketiga yang dikenali sebagai Lanai, pesanan penghantaran Lanai, invois cukai dan pembayaran yang dibuat oleh plaintif kepada Lanai. PW3 juga memberi keterangan mengenai jumlah yang perlu dibayar di bawah pelbagai dokumen yang diberikan dan jumlah keseluruhan yang dinyatakan perlu dibayar dan terhutang oleh Facilipack. PW4, pengarah urusan plaintif merujuk kepada pesanan teks ('pesanan teks') di antara dia dan defendan kedua. PW4 menyatakan bahawa pesanan teks ini menunjukkan bukti bahawa pembekal telah menghantar barang ke Facilipack sejak November 2016 hingga Februari 2018, bertentangan dengan dakwaan defendan. Defendan menghujahkan tiada kes untuk dijawab dan akibatnya, peguam yang terpelajar bagi pihak defendan-defendan diajukan pada pemilihan biasa untuk tidak mengemukakan keterangan jika penghujahan gagal, dan peguam yang terpelajar bersetuju. Defendan menyatakan bahawa sebenarnya tidak ada barang yang pernah dibekalkan oleh plaintif kepada Facilipack. Urus niaga yang digambarkan dikatakan sebagai penipuan yang dibuat semata-mata untuk membantu penggunaan kemudahan perbankan oleh Facilipack yang diterima oleh plaintif dari banknya, Malayan Banking Bhd ('Maybank'). Defendan seterusnya menyatakan bahawa urusan sebenar antara pihak plaintif (sebagai anak syarikat kepada syarikat tersenarai awam yang dikenali sebagai Dataprep Holdings Bhd) dan Facilipack adalah urus niaga pinjaman wang haram yang bertentangan dengan Syarat Penyenaraian Bursa Malaysia dan oleh

itu tidak sah. Selain itu, berdasarkan pesanan teks tersebut, defendan-defendan mendesak mahkamah untuk membuat kesimpulan bahawa pihak-pihak tersebut ingin menipu Maybank dan pesanan teks tersebut juga membuktikan bahawa sebenarnya tidak ada penjualan resin dan transaksi tersebut tidak berlaku.

Diputuskan, membenarkan tindakan plaintif:

(1) Peguam yang terpelajar bagi pihak defendan-defendan berhujah bahawa kebanyakan pesanan penghantaran tersebut menyatakan bahawa resin tersebut dijual kepada dan diserahkan kepada plaintif. Walaupun begitu, pada masa yang sama, di atas sebahagian pesanan penghantaran yang sama, terdapat juga setem Facilipack yang mengakui penerimaan resin yang dihantar. Saksi-saksi plaintif mungkin tidak memberikan resin itu sendiri dan oleh itu mungkin tidak mempunyai pengetahuan peribadi mengenai penyerahannya kepada Facilipack. Namun, dokumen-dokumen yang dikemukakan sebagai keterangan prima facie menunjukkan bahawa resin telah dibeli dan dihantar kepada Facilipack dan keadaan tersebut kekal melainkan keterangan sebaliknya dikemukakan (lihat perenggan 66).

(2) Berkenaan dengan pesanan teks tersebut, PW4 menjelaskan bahawa pertanyaan Maybank adalah disebabkan oleh kesilapan pada nombor van dan treler yang diberikan. Walaupun dicadangkan oleh peguam terpelajar bagi pihak defendan-defendan, PW4 menafikan bahawa keseluruhan keadaan ini adalah kerana sebenarnya tidak berlaku penghantaran fizikal. PW4 telah memberikan keterangan terhadap konteks pesanan teks tersebut dan memberikan penjelasannya, dengan mengambil kira pesanan teks itu sendiri, yang masuk akal atau dapat dilaksanakan. Oleh itu, melainkan keterangan yang sebaliknya dikemukakan, desakan oleh defendan-defendan untuk mahkamah membuat inferens seperti yang dinyatakan tidak dapat mengatasi keterangan bertentangan oleh PW4 (lihat perenggan 75–76).

(3) Sama ada ianya adalah skim yang tidak sah untuk meminjamkan wang kepada Facilipack akan bergantung terutamanya kepada pembuktian bahawa sememangnya tidak ada penjualan dan pembelian resin yang dijalankan dan seperti yang digambarkan oleh dokumen dan disaksikan oleh saksi-saksi plaintif (lihat perenggan 80).

(4) Berkenaan dengan pelanggaran syarat penyenaraian Bursa, perjanjian perolehan dan pembekalan tersebut adalah di antara plaintif dan Facilipack dan persetujuan terma kredit tersebut adalah di antara plaintif dan Facilipack. Plaintif itu sendiri, berbanding Dataprep Holdings Bhd, adalah syarikat sendirian berhad dan bukan syarikat yang tersenarai. Oleh itu, plaintif tidak berada di bawah bidang kuasa Bursa. Selain itu, tidak terdapat apa-apa yang menunjukkan bahawa syarat penyenaraian

Bursa memiliki kekuatan undang-undang sama ada sebagai undang-undang bertulis atau undang-undang tidak bertulis. Syarat penyenaraian Bursa mempunyai kekuatan mengikat antara Bursa dan syarikat-syarikat yang berada dibawah bidang kuasanya tetapi syarat penyenaraian tersebut tidak akan menjadikan apa-apa kontrak yang melanggarnya tidak sah atau akan menarik pemakaian s 24 Akta Kontrak 1950 (lihat perenggan 81–82).

(5) Keterangan yang dikemukakan oleh plaintif dengan jelas membuktikan kes prima facie terhadap defendan-defendan bagi jumlah yang dituntut. Walaupun beban pembuktian undang-undang pada setiap masa adalah ke atas plaintif, namun, dari keterangan yang dikemukakan oleh plaintif, beban keterangan telah dialihkan kepada defendan-defendan. Oleh kerana tidak ada keterangan yang dikemukakan oleh defendan-defendan, tidak ada apa-apa untuk menyangkal keterangan yang dikemukakan oleh plaintif. Dalam hal ini, pengajuan persoalan-persoalan sahaja oleh defendan-defendan adalah tidak memadai untuk mencabar kesahihan kes yang dikemukakan oleh pihak plaintif tanpa adanya apa-apa asas keterangan. Dengan mempertimbangkan hal-hal di atas, mahkamah memutuskan bahawa hujahan tiada kes untuk dijawab oleh defendan-defendan telah gagal. Setelah memilih untuk tidak memberikan keterangan, mahkamah tiada pilihan melainkan untuk memasukkan penghakiman yang memihak kepada plaintif (lihat perenggan 89–90 & 92–94).]

Cases referred to

Alexander v Rayson [1936] 1 KB 169, CA (refd)

Assa Abloy Malaysia Sdn Bhd v Emir Enterprise Sdn Bhd [2014] 1 MLJevi 1; [2010] 1 LNS 1705, HC (refd)

Benham Ltd v Kythira Investments Ltd and another [2003] All ER (D) 252 (Dec); [2003] EWCA Civ 1794, CA (refd)

Boyce v Wyatt Engineering and others [2001] All ER (D) 16 (May), CA (refd)

Miller (t/a Waterloo Plant) v Cawley [2002] All ER (D) 452 (Jul), CA (refd)

Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased) [2018] 12 MLJ 166; [2019] 6 CLJ 771, CA (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85; [2010] 1 CLJ 484, CA (refd)

Yui Chin Song & Ors v Lee Ming Chai & Ors [2019] 6 MLJ 417, FC (refd)

Legislation referred to

Companies Act 2016 s 405
Contracts Act 1950 s 24
Specific Relief Act I950 s 41

Muhammad Hisham bin Ramdzan (Abdul Malik & Co) for the plaintiff.
Alan Wong (YJ Yap with him) (Yap Siew Yee & Co) for the defendants.

Darryl Goon J:

[1] This was an action brought by the plaintiff against the defendants in their capacity as guarantors for the financial obligations of a company by the name of Facilipack Industries Sdn Bhd ('Facilipack').

[2] This action proceeded to trial and the plaintiff's case was heard over a period of two days through the testimonies of four witnesses.

[3] Upon the close of the plaintiff's case the defendants, through learned counsel, sought to make a submission of no case to answer.

SUBMISSION OF NO CASE TO ANSWER

[4] When, in a civil or commercial trial and after the plaintiff's case is closed, the defendant seeks to submit that he has no case to answer, the efficacy of the court's process is put in an awkward position.

[5] As Simon Brown LJ explained in delivering the decision of the English Court of Appeal in *Benham Ltd v Kythira Investments Ltd and another* [2003] All ER (D) 252 (Dec); [2003] EWCA Civ 1794:

> 31. ... *The disadvantages of entertaining a submission of no case to answer are plain and obvious* and have been spelled out already in the cases. Essentially they are twofold. *First*, as Mance LJ explained both in *Boyce* and in *Miller*, the submission interrupts the trial process and requires the judge to make up his mind as to the facts on the basis of one side's evidence only and applying the lower test of a prima facie case with the result that, if he rejects the submission, he must then make up his mind afresh in the light of whatever further evidence has been called and on the application of a different test. This, to say the least, is not a very satisfactory procedure. *The second* disadvantage, as again Mance LJ made plain in *Boyce* and *Miller*, is that if the judge both entertains and accedes to a submission of no case, his judgment may be reversed on appeal with all the expense and inconvenience resulting from the need to resume the hearing or, more probably, retry the action.

(See *Boyce v Wyatt Engineering and others* [2001] All ER (D) 16 (May); *Miller (t/a Waterloo Plant) v Cawley* [2002] All ER (D) 452 (Jul) and see also *Alexander v Rayson* [1936] 1 KB 169 at p 178).

[6] In light of such considerations, the practice and basic principles relating to a submission of no case to answer in a civil trial were set out by Ramly Ali FCJ in *Yui Chin Song & Ors v Lee Ming Chai & Ors* [2019] 6 MLJ 417 in paras 45–46:

A [45] This practice which should be followed by the court in such circumstance has been approved again and again in a number of authorities such as *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152 (CA); *Yuill v Yuill* [1945] 1 All ER 183; *Storey v Storey* [1961] P 63 (CA); *Ramayee Gengau & Ors v Tan Yik Kok & Anor* [1983] 1 CLJ 326; *Simirah v Chua Hock Lee & Anor* [1963] 1 MLJ 239; and *Young v Rank* [1950] 2 KB 510.

B [46] The basic principles on the issue as adopted in those authorities cited above may be summarised as follows —

(a) *where the defence submits no case to answer, the trial judge must put to the defence the election available as to whether he wishes to call evidence for the* C *defence or not*; the judge should generally refuse to make such a ruling on such submission of no case to answer unless the defence makes it clear that he does not intend to call evidence;

(b) if the judge does not put the defendant to election whether to call evidence or not, then in such a situation the defence retains his right to call evidence D if his submission fails; and

(c) *if the defendant or his counsel has so elected, he is bound by it and loses his right to call evidence in the defence case and accordingly must stand or fall on their submission*. (Emphasis added.)

E **[7]** Therefore, as is almost invariably the rule, the defendants were put to the election that should their submission of no case to answer fail, they would elect to call no evidence. Through learned counsel, the defendants so elected.

F **[8]** There are clearly significant risks involved in seeking to submit no case to answer and electing not to call any evidence. The defendants, for reasons best known to them and their legal advisors, had nevertheless agreed to submit themselves to the risks involved.

G THE PLAINTIFF'S CASE

[9] It was an agreed fact by the parties that the plaintiff and Facilipack had entered into a written contract entitled 'Procurement and Supply Agreement' dated the 1 November 2016.

H **[10]** Facilipack was a company involved in the supply of biodegradable plastic containers. However, by order of court dated the 2 September 2016, Facilipack was placed under judicial management pursuant to s 405 of the Companies Act 2016.

I **[11]** At this juncture, it is pertinent to point out that the documents in all the bundles namely B1, B2 and B3 were, by consent, tendered into evidence as Part B documents, that is to say the existence of those documents were not in dispute but their contents were not admitted.

[12] The procurement and supply agreement was tendered into evidence and it disclosed that the plaintiff had agreed to 'procure, supply and sell' to Facilipack 'ICT, ICT-related and trading products, peripherals, equipment, solutions and services ('the goods')'. It was also agreed that the payment terms would be 'in accordance with the Credit Approval Letter issued' by the plaintiff to Facilipack and that the payment terms may be changed from time to time. It was also provided that, in relation to the performance of this agreement, delivery shall be completed by the plaintiff 'and/or its appointed agents'.

[13] On this procurement and supply agreement were found the signatures of the first and second defendants respectively, they having signed for and on behalf of Facilipack, as directors.

[14] There was also led in evidence a letter dated 24 November 2016 from the plaintiff to Facilipack. This letter recorded the plaintiff's approval in respect of a 'Credit Application' by Facilipack and set out the terms and conditions for the approved credit facility.

[15] Among the terms given for Facilipack's application for this credit facility were, inter alia, the following:

(a) a credit limit of up to RM2m;

(b) a tenure of one year from '01/12/16 to 30/11/17 subject to yearly review and renewal with a one month termination notice period';

(c) purpose being 'To purchase raw materials from SOLSIS, of which SOLSIS will procure and supply to FISB';

(d) payment terms of 60 days from the date of invoice;

(e) guarantees by the directors;

(f) an agreed mark up of 6% on top of, inter alia, the purchase consideration, bank charges and carriage; and

(g) overdue interest of 6%pa.

[16] Also tendered into evidence were two written documents entitled 'GUARANTEE AND INDEMNITY' signed, respectively, by the first and second defendants. Both these guarantees bore a RM10 stamp dated 6 December 2016. These guarantees were in identical terms and they each made specific reference to the credit facility as per the letter dated 24 November 2016 from the plaintiff to Facilipack. By these guarantees the first and second defendants each guaranteed payment of any amounts owed by Facilipack to the plaintiff under the said credit facility.

[17] There was also in evidence, a letter dated 17 January 2017 from Facilipack to the plaintiff seeking to vary the credit terms to ninety days instead of 60 days. Also requested by Facilipack in this letter was an, 'Additional Credit Limit of RM3,000,000 on top of current credit granted'. The reason for this request included 'the constant ongoing increase of raw material prices' and the 'need for purchase of raw material constantly growing'.

[18] Also contained in this letter of 17 January 2017, was a paragraph stating as follows:

> As we intend to work with you hand in hand in growing our business, with your kind support, we have also commenced payments on the previously drawn down bills and will continue payments early before the due date whenever possible.

[19] This request was not agreed to in its entirety. The plaintiff in a letter dated 25 January 2017 replied, agreeing only to 'increase your current limit of RM2 million to RM4 million'. This was to be effective from 1 February 2017.

[20] The credit terms for repayment remained at 60 days rather than the ninety days requested. All the other terms of the credit facility given were to remain the same.

[21] On the 14 June 2017, Facilipack reiterated its request for a higher credit and for a longer credit period by way of a letter in identical terms to those set out in its earlier letter of 17 January 2017, save for the additional credit sought, which now was for a credit of RM2m on top of the then current credit limit of RM4m ie making a total of RM6m.

[22] This letter of Facilipack of 14 June 2017 was followed by another letter of 28 June 2017, seeking to have bank charges of RM45,255.26 waived by the plaintiff. In this letter it was also stated that Facilipack had made payments on the 31 January 2017, the 14 and 28 February 2017 and the 31 March 2017.

[23] In reply, the plaintiff wrote on 29 June 2017 declining to waive payment of its bank charges but agreeing to increase Facilipack's credit limit and payment terms. The following was stated in the plaintiff's letter:

> Accordingly, we regret that we cannot accede to your request to waive the bank charges. However as a matter of goodwill, please note the followings:
>
> 1. In support of your growing business, we agree to further extend FISB credit period to 90 days and to increase the credit limit to RM6 million (reference your letter dated 14 June 2017) effective 1 July 2017. Other terms and conditions will remain the same. On this premise, please note

we have applied to increase our own bank facilities by another RM3.5 million and have incurred approx. RM40 thousand in legal and stamping fees.

2. Our mark-up of 6% will be for only the transaction and also effective from 1 July 2017.

[24] On 30 October 2017, Facilipack wrote to the plaintiff seeking to extend the credit facility which was expiring in December 2017. This letter also stated the following, the relevance of which will be apparent later on in this judgment:

As a result, this had caused our internal operations to be quite dependent on this facility. However, we wish to assure you everything is on track for our expected IPO & will update you as more info coming in soon.

Please find a copy of the attached letter, the minutes of our board meeting, which includes our rational (sic) of the slight delay.

Please expect a copy of MIDF Due Diligence Working Group to reflect the sales of our company at later stage.

This letter was signed by both the first and second defendants. 'IPO' in this context was taken to mean an 'initial public offering'.

[25] On 6 November 2017, the plaintiff wrote to Facilipack agreeing to renew the credit facility, referred to by the plaintiff as the 'supply contract', after its expiry on 27 November 2017, for another six months plus a further six months. The further six months extension was stated to be subject to further review. To facilitate the extension, the plaintiff required, inter alia, an increase of the liability under the personal guarantees from RM2m to RM6m, plus a corporate guarantee.

[26] There was also tendered into evidence two further written documents entitled 'GUARANTEE AND INDEMNITY' also signed respectively, by the first and second defendants. On both these guarantees were also affixed a RM10 stamp each and dated 21 November 2017.

[27] These guarantees referred specifically to the credit facility extended on 24 November 2016 and the plaintiff's extension of the facility by its letter of 6 November 2017. By these guarantees the defendants each guaranteed, inter alia, payment to the plaintiff of monies owed by Facilipack to the plaintiff, upon a written demand being made on them. No specific limit of liability was actually set out in either of these guarantees.

[28] We then move to June 2018. A letter dated 26 June 2018 sent by the plaintiff to Facilipack disclosed signs of problems with repayment under the supply and procurement agreement. The caption to this letter was:

RE: CREDIT FACILITY

PROCUREMENT & SUPPLY AGREEMENT DATED 1 NOVEMBER 2016

AMOUNT OUTSTANDING: RM6,232,709-93 (AS AT 15 JUNE 2018)

[29] This letter referred to a meeting among the parties, presumably their representatives, on 21 June 2018 at 9am at Facilipack's Klang factory office. It referred to a discussion as to the agreed amount owing and an agreement to make payment within certain time periods. This was followed by a reply from Facilipack dated 26 June 2018, acknowledging the agreements between the parties but denying the amount allegedly owed. The following was stated in Facilipack's reply:

> ... We have not and do not hereby acknowledge at any point during the meeting that the amount outstanding, if any, is valid and to be paid by us as indicated in your letter.
>
> Rather, we acknowledge that there is a credit facility in existence provided by Solsis (M) Sdn Bhd (hereinafter referred to as 'Solsis') for us to purchase and procure raw materials from Solsis wherein Solsis purchases raw materials from third party suppliers for onward resale and delivery to us.
>
> Hence any amounts indicated to be owing by Solsis (sic) shall go through the regular processes wherein we have to confirm that the invoice has been properly issued, goods received and amounts keyed into our system.
>
> An alleged verbal confirmation during a meeting shall not be taken as an admission of debt and/or liabilities.

[30] This was followed by a letter dated 1 October 2018 from the plaintiff's solicitors to the defendants demanding payment of a sum of RM6,132,709.93 on behalf of the plaintiff. There was also a demand made on Facilipack by the plaintiff's solicitors dated 16 October 2018, demanding payment of the same amount.

[31] The plaintiff's witness Mohamad Sabir bin Mohamad Sabri ('PW1') testified that by the procurement and supply agreement, the plaintiff procured the supply of resins to be sold to Facilipack with payments to be made by Facilipack to the plaintiff upon the credit terms agreed. PW1 stated that he was directly involved in the transactions between the parties from sometime in mid-2018. He testified that he was appointed the managing director of the plaintiff on 15 November 2017.

[32] The resins supplied to Facilipack were for its production of plastic containers. The resins were the main base material for the production of the containers.

[33] PW1 testified to the documents referred to above and explained the modus operandi between the parties. He testified that upon receipt of a purchase order from Facilipack, the plaintiff would procure the required resins from a supplier called Melor Sekinchan Enterprise ('Melor'). The plaintiff would then instruct Melor to deliver the resins to Facilipack. Melor would in turn issue invoices for payment and the plaintiff would pay Melor upon the invoices issued. The plaintiff would then issue its invoices to Facilipack for payment for the resins supplied.

[34] Thus, in essence, the plaintiff was the 'middle man' in the supply of resins to Facilipack. The plaintiff would pay the supplier of resins and would then follow up by issuing its invoice to Facilipack upon the terms of the procurement and supply agreement. At the same time, Facilipack would enjoy the credit terms allowed by the plaintiff for payment of its invoices. The net effect would be that by this arrangement, Facilipack would enjoy an extended period of credit for its payment for resins purchased.

[35] It was also explained by PW1 that the plaintiff had no storage place for the resins and therefore the resins purchased by the plaintiff from the suppliers were delivered directly to Facilipack.

[36] PW1 then testified to the various documents led in evidence, including the purchase orders placed with the plaintiff by Facilipack, quotations by Melor, delivery orders and Invoices by Melor.

[37] PW1 testified that subsequently, the plaintiff was asked to procure resins from another company known as Lanai Tropika Sdn Bhd ('Lanai'). PW1 testified that this change was in fact initiated by the plaintiff. Apparently, the plaintiff's financiers had requested that the procurement and purchase of resins should be from a company and not a partnership such as Melor.

[38] In relation to the supply of resins by Lanai, PW1 testified to the purchase orders by Facilipack, quotations from Lanai, delivery orders by Lanai, invoices by Lanai, and the plaintiff's invoices to Facilipack.

[39] PW1 also tendered a list of the transactions in a prepared table indicating that there were fifty transactions between the plaintiff and Facilipack, totalling RM34,095,082.26. The outstanding amount owed by Facilipack was RM6,050,735.16. There were additional sums added to this, consisting of bank charges and late payment charges totalling RM252,402.62, thus making the total amount owed by Facilipack, and accordingly the total amount claimed against the defendants as guarantors, the sum of RM6,303,137.78.

A **[40]** PW1 also testified that there were a series of discussions and negotiations between the parties to resolve the matter and he referred to communications between the parties towards this end.

B **[41]** There was an email by the second defendant to the plaintiff, referring to a telephone conversation and Facilipack's plan to reduce the sums owing to the plaintiff.

C **[42]** There were also emails from the plaintiff's officer one Tan Hock Chye to the second defendant asking the latter to attend to a cheque made out to the plaintiff in respect of which payment was stopped and a statement which was provided to Facilipack, indicating the amount outstanding and due from Facilipack to the plaintiff. There were other emails from the plaintiff pressing for payment of the outstanding debt and emails which showed the plaintiff D seeking information of Facilipack's unencumbered assets and the second defendant indicating that he was trying to ascertain the same. There was also an elaborate settlement proposal sent by the second defendant to the plaintiff in an email dated 3 September 2018, which would involve a corporate exercise in which Dataprep Holdings Bhd would be required to acquire the entire assets of E Facilipack. The plaintiff was, and is a subsidiary of Dataprep Holdings Bhd. Suffice to say nothing came out of all these proposals.

F **[43]** Hasrul bin Hasan testified on behalf of the plaintiff as PW2. He testified that he too was directly involved in the transactions between the parties from mid-2018. He was appointed the chief operating officer, finance and services, of the plaintiff on 1 March 2018. His name appears in some of the emails sent. In his testimony he referred to most, if not all, the documents referred to by PW1 and sought, essentially, to corroborate the testimony of G PW1.

[44] There was then the testimony of PW3, who was one Khairul Suhaila bt Masurun. PW3 was an accounts executive with the plaintiff and testified to the various documents tendered namely the purchase orders, quotations by Lanai, H Lanai's delivery orders, tax invoices and payments made by the plaintiff to Lanai. PW3 testified to the amounts due under the various documents issued and the total amount said to be due and owing by Facilipack.

I **[45]** Lastly, there was the testimony of one Tan Hock Chye who was the Chief Business Officer and, subsequently, Managing Director of the plaintiff. He testified as PW4. He retired on 30 June 2019 and testified that he had personal knowledge of the transactions between the parties. His testimony was much the same as that of PW1 with an added reference to evidence of text messages between him and the second defendant.

[46] The text messages adduced in evidence were text messages sent by mobile devices by means of a popular software application called 'WhatsApp'. Text messages were exchanged between PW4 and the second defendant. PW4 confirmed that the text messages were indeed those exchanged between him and the second defendant. As far as PW4 was concerned, these messages showed proof that the suppliers had been sending the goods to Facilipack since November 2016 until February 2018, contrary to the defendants' contention.

THE DEFENDANT'S SUBMISSION OF NO CASE TO ANSWER

[47] It was against the foregoing evidence led by the plaintiff that at the close of the plaintiff's case, learned counsel for the defendants opted for submitting no case to answer. In doing so, and as indicated, learned counsel was put to the usual election not to call any evidence should the submission fail, and learned counsel so elected.

[48] In their joint defence, the defendants pleaded that all the documentation referred to were not for the purposes described in the procurement and supply agreement.

[49] The defendants pleaded that the plaintiff never sold, supplied and/or shipped any 'ICT, ICT related and trading products, peripherals, equipment, solutions and services' referred to in the procurement and supply agreement. It was also pleaded that any guarantee that exists, to which the plaintiff was put to strict proof, was solely for the sale of the items specifically in the procurement and supply agreement.

[50] Therefore, it was the defendants' pleaded case that the guarantees were neither valid nor binding.

[51] What the defendants pleaded in their defence was that the procurement and supply agreement and the guarantees were all part of a scheme created to give the impression that there existed genuine transactions between the parties, when in fact that was not so.

[52] It was pleaded by the defendants that the scheme was to create an impression that the plaintiff's business would appear to increase and in turn Facilipack would be provided financial assistance.

[53] The defendants pleaded that the scheme and documents created were unlawful and/or contrary to public policy and/or created to mislead certain authorities. Therefore, it was pleaded, the documents created were invalid, null and/or unenforceable.

A **[54]** In the submissions by learned counsel for the defendants, it was maintained that no goods were in fact ever supplied by the plaintiff to Facilipack. The transactions portrayed were said to be a sham created for the sole intention of facilitating the use by Facilipack of the banking facilities that the plaintiff enjoyed from its bank, the Malayan Banking Bhd ie Maybank.
B Counsel went so far as to contend that the actual dealings between the plaintiff and Facilipack were illegal money lending transactions. This, it was also contended, was contrary to the Listing Requirements of Bursa Malaysia and thus illegal.

C **[55]** Learned counsel first stated that that Lanai was a RM2 company and the first defendant was a director and shareholder. From this, learned counsel contended that it defied logic that Facilipack should have to go through the plaintiff to purchase resins when it could have bought them directly from a
D supplier. It was contended that there was no need to maintain the plaintiff as a 'middle man' for Facilipack to purchase resins. Learned counsel then posed the question, why would Facilipack purchase resins through the plaintiff who was not even a manufacturer or trader in resins.

E **[56]** It was also submitted that based on Lanai's bank statements adduced into evidence, moneys paid by the plaintiff purportedly for the supply of resins were subsequently credited into Facilipack's account by Lanai.

F **[57]** Then there was the contention by the defendants that part of the text messages in evidence demonstrated that the plaintiff and Facilipack were formulating an 'explanation' to Maybank's suspicion about the transactions, because the vehicle used to transport resins from Melor and Lanai was merely an MPV van.

G **[58]** It was further argued by learned counsel for the defendants that based on the answers extracted from PW1 under cross-examination, the margins of profit that the plaintiff would make was very low, only 1% to 2%. It was suggested that it made no business sense for the plaintiff to provide credit terms
H for up to RM6m for such low margins.

[59] The defendants also contended that there was evidence from PW2 that commissions were paid to one Roy Ho Tew Kee as an advisor to the plaintiff and somehow this was also said to be indicative of impropriety.

I **[60]** The fact that the plaintiff was told to purchase resins from Lanai was used to support an argument that a normal vendor would source its suppliers to maximise its profits and not be told to procure it from any specific company. In addition, it was contended to be illogical and unusual to look to Lanai for the

supply of resins. This was said to be because Lanai was merely a RM2 company incorporated on 20 January 2017 and it appeared to be neither a manufacturer nor a supplier of resins.

[61] Learned counsel for the defendants also pointed to the answer given by PW2 in reply to the following questions put to him under cross-examination:

AW:	And coming back to the Maybank Bankers Acceptance facility, Encik Hasrul the my instructions is that this whole procurement and supply was really that a structure to allow Facilipack to use Plaintiff's Maybank facilities. Would you agree?
PW2:	Yes
	...
AW:	Encik Hasrul would you agree is my instruction that this buying and supply of plastic resin was a structure to allow Facilipack to use the Plaintiff's Maybank facility?
PW2:	Yes

[62] Having regard to the foregoing, it was submitted that the defendants had no case to answer.

DO THE DEFENDANTS HAVE A CASE TO ANSWER?

[63] As stated, the existence of the procurement and supply agreement was admitted. The various documents referred to were admitted into evidence, by consent, as Part B documents.

[64] In regard to the procurement and supply agreement, although resins may not be regarded as ICT products, there is no reason why they may not come within the meaning of the term 'trading products'. Indeed, the plaintiff and Facilipack in their dealings were quite content to regard the sale of resins to be within the ambit of the procurement and supply agreement. Being the only parties to this agreement, there is no reason why they may not agree to this.

[65] Purchase orders, quotations, delivery orders, tax invoices were tendered into evidence to support the plaintiff's claim against the defendants, as guarantors for Facilipack.

[66] It was argued by learned counsel for the defendants that in many of the delivery orders, it was stated that the resins were sold to and delivered to the plaintiff. That may well be so, but at the same time, on some of the very same delivery orders there were also Facilipack's stamps acknowledging receipt of the resins delivered. The plaintiff's witnesses may not have delivered the resins themselves and therefore may not have personal knowledge of their delivery to

Facilipack. Yet, the documents tendered in evidence point, prima facie, to resins having been purchased and delivered to Facilipack and they remain so, until and unless evidence to the contrary is led (see *Assa Abloy Malaysia Sdn Bhd v Emir Enterprise Sdn Bhd* [2014] 1 MLJevi 1; [2010] 1 LNS 1705 at paras 17 and 19, where Mary Lim J, as Her Ladyship then was, was faced with a similar situation in respect of delivery orders tendered in evidence and a submission of no case to answer).

[67] However, to my mind, there was no obvious inconsistency as such. As the plaintiff's witnesses had testified, the resins were bought by the plaintiff for sale to Facilipack. The plaintiff was the 'middle man'. It would not be wrong for a supplier to the plaintiff to state that the resins were sold to the plaintiff and to be delivered to the plaintiff. Although as it turned out, it would have been more accurate to state that the resins were delivered to the account of the plaintiff, but the failure to do so does not per se, necessarily mean that no resins were sold or delivered at all.

[68] From the terms of the procurement and supply agreement and the credit terms of payment granted by the plaintiff to Facilipack, it would not be wrong to say that the plaintiff was providing assistance to Facilipack. The nature of the assistance was not so much a loan of monies to Facilipack but was in essence to provide Facilipack with the benefit of having a longer period of time within which to pay for resins purchased. Hence the credit period given to Facilipack of 60 days within which to pay for resins purchased from the plaintiff, or through the plaintiff, and which credit period was subsequently extended to ninety days.

[69] In this regard the testimony of PW4 under cross-examination was significant. He testified that the transactions were not designed mainly to increase the plaintiff's revenue but to assist Facilipack, in which company the plaintiff thought it might be part of. The following was PW4's testimony under cross-examination:

AW:	You were agree that this business or as you mention before the profit margin was very small, between 2-3% profit margin?
PW4:	I only know is a single digit but I cannot confirm whether is a 2 or 3%.
AW:	And my instruction is about 2 and 3% after the cost of interest and other charges from using Maybank facility. You agree to that?
PW4:	I can't remember
Hakim:	Could it be as low as that?
PW4:	I think higher.
AW:	But we could at least agree that was low margins isn't it as you mentioned earlier?
PW4:	Trading is always low margin, yes.

AW: Mr Tan do you agree with me Mr Tan that this arrangement which have entered into with Facilipack was really to increase as far as group is concerned the revenue of the company?

PW4: No

Hakim: Not to increase the revenue of the company?

PW4: The main reason is not to increase our revenue of the company.

AW: Then what was the main reason?

PW4: The main reason was at that point in time we are on the lookout for expansion, diversification and M&A activities including to be a anchor cornerstone shareholder of an impending IPO company like Facilipack.

AW: So you mentioned diversification which mean diversifying into other businesses?

PW4: Yes.

AW: And in earlier you mentioned that one of the main things you were looking into Facilipack was to see how to help them grow their business by way of financial assistance?

PW4: Yes grow their business and assist them to have their IPO faster.

...

Hakim: So the company can be part of it?

PW4: Yes, so we can be part of it yes, in terms of a shareholder.

AW: Mr Tan, isn't it true Mr Tan that the real arrangement herein is really to allow Facilipack to utilize the Maybank facilities?

PW4: No.

...

AW: Mr Tan the reason for doing so was really to allow Solsis to charge an interest or earn an interest from the lending which has been done to Facilipack?

PW4: No

...

PW4: The arrangement is we procure, buy the resins and then we do a mark up we charge Facilipack.

Hakim: Yes but the credit line was provided by Maybank facility?

PW4: No, credit line was not provided to Facilipack. Is Solsis credit line. Solsis got to use his credit line with Maybank. Not Facilipack.

[70] PW4's testimony was also consistent with Facilipack's letter of 30 October 2017 to the plaintiff seeking to extend the credit facility which was expiring in December 2017 and making reference to an intended 'IPO'.

[71] If at all, it can only be said that ultimately the benefit of the procurement and supply agreement and the credit facility provided by the plaintiff to Facilipack, was the extra time given to Facilipack to pay for the resins it purchased.

[72] It therefore does not seem as illogical as learned counsel for the defendants suggests, for the plaintiff to enter into the arrangement with Facilipack. There was a commercial reason for it as stated by PW4. There was an advantage for Facilipack in that it would have more time to pay for the resins it purchased. At the same time, the plaintiff would still receive a margin of profit, albeit said to be a low one.

[73] This then takes us to the text messages in evidence. The following were the text messages exchanged between PW4 and the second defendant. As these text messages were relied upon by learned counsel for the defendants to suggest an inference that was said to support the defendant's contention, they are set out quite extensively to ensure that the context and nuances of associated text are not obscured.

21 FEBRUARY 2018

Bro, as spoken last wk, see below & pls add ur comments. Objective is to satisfy MBB risk side otherwise they might not proceed.

Points for MBB:

1. WVM1048 is a 40' trailer (see photo) and is owned privately by a 3rd party i.e. xxxxxxx. Both Melor Sekinchan and Lanai Tropika hire this trailer as they are familiar with Facilipack loading/unloading procedures.
2. Journey from Batu caves (previously Melor Sekinchan's office) to Kota Damansara (Facilipack's office) is approx. 20-30 minutes.
3. Journey from Pelabuhan Klang (Lanai Tropikia's office) to Kota Damansara (Facilipack's office) is also approx. 20-30 minutes.
4. Trailer can take 30tons per trip and will normally take several trips during the day to complete the shipment. Depending on the tonnage, it may take a few trips or several trips during the day.
5. Facilipack new office is not in Klang and the journey is now shorter as Lanai Tropika's office is also in Port Klang.
6. Xxxxxxxxxx
7. Xxxxxxxxx

...

For Mr Tan info Lanai Tropika is a transport company n the vehicle registration number could be a van not a trailer according to JPJ record.

Above from my staff. Probably MBB has done conducted a search.

Bro tan:

Lanai Tropika as we established (and changed) in the past is a transport, warehousing, general trading, commodities company

This is the nature of business in the registration documents with SSM

Vehicle — I'm checking w transporter to make sure but unable to reach him yet.

OK. Therefore we need to think on how to response favourably to MBB.

Yes ... Im thinking up a suitable and favorable response now.

Truth be told —

With regards to vehicle on DO, ive checked thru some samples today, around 10–15 D/O's from large MNC's like Lotte Chemical Titan, Idemitsu

Alot of them dont even specify vehicle number. They just leave it blank. Infact Titan had put one as WWW1111.

I dont imagine that is correct.

Is there any way to justify it to MBB and indicate that it is unlikely to be accurate but if the bank so insists, we can insist on accuracy from supplier moving forward.

Problem is why they put d vehicle no. No wonder MBB is suspicious as same vehicle for Melor and Lanai.

Yes, let me think it thru And come up with a plausible explanation.

23 FEBRUARY 2018

We have to tell MBB —

Have spoken to Lanai Tropika (seller) and Facilipack (Buyer)

Lanai Tropika is a general trader of all kinds of commodity materials — These materials come from a variety of suppliers like Lotte Chemical Titan, Japan Polypropylene etc.

As the materials are extremely bulky, Solsis is not in a position to receive these materials physically prior to sending them to the buyer (Facilipack).

The material that is sold by Lanai Tropika to Solsis and onward to Facilipack is JPM's Metallocene PP and this is imported in standard 20' or 40' containers into Port Klang.

The trucks will pick up these containers along with the clearing of customs and declaration.

The goods will then be delivered either to

Lanai Tropika's warehouse pending delivery to Facilipack.

OR

Directly to Facilipack's warehouse if green light from Solsis has been given.

Given the fact that the trucking is provided by the haulage company (freight forwarder) that is clearing the cargo and hauling it from the port, the registration number is constantly changing depending on which truck and prime mover is picking up the container on that day.

If the goods are to be sent directly to Facilipack, Lanai Tropika will ensure its personnel are present at the site to endorse and confirm receipt of the goods by Facilipack. The vehicle used by Lanai Tropika's staff is a MPV Van bearing registration WMR1048.

We need to talk about the van also. Either to apologize for the consistent error

A which on all the DOs and to support with the trailers reg. no. etc. ... appeared on

> Trailers Reg No : We dont actually have this information for past, best we can do is provide for current and future.

Then how to mitigate the van problem which MBB has found out?

B

> Have to tell them the truth, and inform them

Solsis is facility owner. Lanai tropika is supplier to Solsis.

Hence when MBB raised this query, Solsis naturally queried their supplier Lanai Tropika.

C

This is the formal response that was provided by Lanai Tropika

And perhaps can have Lanai Tropika issue it formally as a letter indicating these items, with an apology, to Solsis for Solsis to provide a copy to MBB

What do you think

D

> OK. Let me gather my thoughts on this on our best reply to MBB. If u remember this is the 2nd time that we encounter problems with MBB. 1st time they questioned Melor and trading of non-IT products. Now they suspect things not in order.

E Yes indeed. Best to be cautious in response and placate their curiosities and worries i suppose.

[74] From these text messages the defendants would have the court conclude that the parties were somehow seeking to mislead Maybank and that, somehow, it also establishes that there were in fact no sale of resins and the transactions were not genuine. Learned counsel in his written submissions posed the question, '17. If the transactions were genuine as claimed by the plaintiff, why was there a need to formulate 'explanation' towards Maybank's query?'

F

G

[75] Under cross-examination, although there was some confusion as to which part of the text was sent by whom, PW4 explained that Maybank's query was due to an error in the van number and the trailers that were given. Although put to him by learned counsel for the defendants, PW4 denied that this was all because there was no actual physical delivery:

H

AW:	So I'm going to put this to you and suggest this to you Mr Tan in fact at all time both and the First Defendant were on a same page and that you all know that this delivery orders was suggest a disguise, there was no actual physical delivery.
PW4:	I disagree.
	...

I

AW:	Mr Tan, I'm just going to suggest to you Mr Tan, this supposed understanding that there was a confusion in truck numbers because of the number delivery day. Is just an afterthought and is was not the real reasons of why Maybank was concerned at the point in time. You can either agree or disagree.
PW4:	Disagree

[76] PW4 had testified to the context of these text messages and had provided his explanation, having regard to the text messages themselves, which to my mind were neither implausible nor inherently unmaintainable. Thus, unless evidence is led to the contrary, the mere inferences the defendants urged the court to draw from these text messages cannot prevail over the testimony of PW4 to the contrary.

[77] There were also text messages in evidence dated 13 April 2017, which stated the price of goods sold, the mark up, payment of GST to Melor and promises to make arrangements for payment to be made to the plaintiff. These text messages in fact pointed to the bona fides of the transactions which the defendants claimed were a sham.

[78] As for the evidence, based on the bank statements of Lanai, that monies paid by plaintiff to Lanai were subsequently paid by Lanai to Facilipack, learned counsel for the plaintiff quite rightly pointed out that that should be a question for Lanai or the first defendant, who was a director of Lanai, to answer. That was not something that the plaintiff would have been aware of.

[79] There was then the contention that the whole scheme was illegal. The defendants' contention was that this was because there were no actual sales and, alternatively, it was a breach of Bursa's listing requirements for a listed public company or its subsidiary to provide the financial assistance alleged to have been provided in this case. It was argued by the defendants that as the plaintiff was a subsidiary of Dataprep Holdings Bhd, which was a listed company, the situation would fall within Bursa's listing requirements. It was contended that even if it was not illegal, it was nevertheless contrary to public policy.

[80] It seems to me that whether it was an illegal scheme to lend money to Facilipack would depend primarily on it being established that there was indeed no sale and purchase of resins transacted and as depicted by the documents and testified to by the plaintiff's witnesses.

[81] As regards the breach of Bursa's listing requirements, suffice it to say that the procurement and supply agreement was between the plaintiff and Facilipack and the credit arrangement was between the plaintiff and Facilipack.

The plaintiff itself, as opposed to Dataprep Holdings Bhd, was a private limited company and not a listed company. As such, the plaintiff itself does not come within the purview of Bursa.

[82] Furthermore, there is nothing to suggest that Bursa's listing requirements have force of law either as written law or unwritten law. Bursa's listing requirements have binding force between Bursa and the companies that are within its purview but they are not such as would render any contract in breach of it an illegality or such as would attract the application of s 24 of the Contracts Act 1950. No authority to the contrary was provided by learned counsel for the defendants.

[83] As regards the commission that was paid to Roy Ho Tew Kee, PW4 explained under cross-examination that he was an advisor/consultant to the plaintiff. PW4 testified as follows:

AW: So what was, coming back to my question, what was Mr Roy Ho's role as a consultant to the company?

PW4: As a consultant to the company his role is to assist us to see whether we can do some business transaction with Facilipack. And the business transaction can be in the form of being their investor as a shareholder or assist them, assist Facilipack in the expansion plans.

[84] Without more in the form of evidence, nothing really turned on the mere fact that a commission was paid to Roy Ho Tew Kee.

CONCLUSION

[85] It is a proposition beyond challenge that the burden of proof is upon the plaintiff. In *Yui Chin Song & Ors,* Ramly Ali FCJ also stated as follows:

> [48] This court in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 has laid down the principle on this issue in the following words:
>
> > The respondent's election to call no evidence at the trial did not preclude the reversal of plainly wrong findings of the High Court by the Court of Appeal. *Though no witnesses were called by the respondent and even if the appellant's evidence was unopposed and therefore presumed to be true, that did not automatically mean the evidence had satisfied the burden of proving the existence of the settlement agreement borne by the appellant, or mean the burden of proving on balance of probabilities no longer applied or that a case to answer was automatically made out. The evidence adduced by the appellant had to be sufficient to prove the existence of the settlement agreement.* The appellant failed to discharge that burden.
>
> [49] *The above ruling was consistent with the well-established principle that the burden of proof at all times is borne by the plaintiff on the balance of probabilities to establish his case against the defendant or the existence of a legally enforceable claim against the*

defendant. It is upon the plaintiff, and certainly not the defendant, to discharge that burden. It is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim. The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law. (Emphasis added.)

[86] In *Benham Ltd,* Simon Brown LJ described the applicable test in respect of a submission of no case to answer:

27. *The test to be applied by the judge if he does entertain a no case submission is whether or not on the evidence adduced by the claimant the claimant has 'a real prospect of success'. As the cases make plain, this is a different and lower test than that of a balance of probabilities, the test to be applied once the court has heard all the evidence that is to be called* ...

...

39. Consistently throughout these passages the judge can be seen to have been asking himself what on the balance of probabilities was the correct inference to draw from the claimants' evidence in the case. That, to my mind, is not the correct question for the judge to be asking himself on a submission. Rather, as indicated above, *the question to be resolved at that stage is whether or not the claim has a reasonable prospect of success, a question which, in a case like this where the defendants' witnesses clearly have material evidence to give on the critical issue in the action, can be re-formulated variously as follows: have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contend, sufficient evidence to call for an explanation from the defendants? That it may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendants' not calling any evidence, would not allow it to be dismissed on a no case submission*. (Emphasis added.)

[87] In this case too, both the first and second defendants would clearly have to provide material evidence if their contentions, as pleaded or argued, were to be considered by the court. What was proffered on behalf of the defendants was a case that seeks to contradict the documentary evidence adduced, which portrays the sale and purchase and delivery of resins to Facilipack through the plaintiff. No documentary evidence of the defendants' allegations may be found in the bundles of documents agreed to and tendered into evidence by the parties. Therefore, the defendant's allegations would probably have to be supported, in the main, by oral evidence.

[88] In the decision of the Court of Appeal in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85; [2010] 1 CLJ 484; Low Hop Bing JCA stated:

[5] In our judgment, *it is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct*: per Gopal Sri Ram JCA in *Jaafar bin Shaari*, at p 712, citing *Wasakah Singh*. This principle has found similar expression

in a number of judgments handed down in the motherland of common law. These cases include *Alexander v Rayson* [1936] 1 KB 169; *Boyce v Wyatt Engineering & Ors* [2001] EWCA Civ 692; *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100; and *Benham Ltd v Kythira Investments Ltd & Anor* [2003] EWCA Civ 1794 (CA).

[89] While the legal burden of proof was always upon the plaintiff, from the evidence led by the plaintiff, the evidential burden had shifted to the defendants (see *Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased)* [2018] 12 MLJ 166; [2019] 6 CLJ 771). Since there was no evidence led by the defendants, there was nothing to rebut the evidence tendered by the plaintiff.

[90] In this regard, it was not sufficient in this case for the defendants merely to pose questions and to challenge the legitimacy of the case presented by the plaintiff without the benefit of any evidential foundation.

[91] As can be seen disclosed in *Benham Ltd*, the standard applicable is somewhat different when a submission of no case to answer is made, and which is invariably made, without the benefit of any evidence tendered by the defendant. In such a situation, there is no countervailing evidence for the court to weigh and thus no preponderance of evidence to speak of. The court would have heard only one side's evidence. What the court can determine is only whether upon the evidence adduced by the plaintiff, documents admitted into evidence and the cross-examination of the plaintiff's witnesses, a prima facie case against the defendant has been established or as put by Simon Brown LJ in *Benham Ltd*, 'whether or not the claim has a reasonable prospect of success'.

[92] Having regard to the evidence led by the plaintiff, the cross-examination of the plaintiff's witnesses, the documents that were led into evidence including the correspondences between the plaintiff and Facilipack, some of which were signed by the defendants, I am of the view that the plaintiff had indeed established a prima facie case to which the defendants must answer if the plaintiff's case was to be rebutted. The evidence led by the plaintiff quite clearly, to my mind, established a prima facie case against the defendants for the amounts claimed.

[93] Even if there may be queries raised as to the legitimacy of the transactions in question, or various aspects of them, these queries alone without any evidential basis cannot operate such as to successfully rebut the plaintiff's case and the evidence led.

[94] In light of the foregoing, I hold that the defendants' submission of no case to answer fails. Having elected to call no evidence, the court is perforce to enter judgment in the plaintiff's favour.

[95] In addition to a claim for the sum owed, there was a prayer for a declaration to similar effect. As is clear from s 41 of the Specific Relief Act I950, a declaration is a discretionary remedy. I do not see that the declaration sought is necessary in this case.

[96] Judgment is therefore entered for the plaintiff in the sum of RM6,303,137.78 together with interest at the rate of 5%pa from 22 October 2018 to the date of full realisation and costs.

Plaintiff's action allowed.

Reported by Dzulqarnain Ab Fatar